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Code Focus Sdn Bhd v Tan Chee Hoe & Sons Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1062 OF 2010
ABDUL MALIK ISHAK, AZHAR MA'AH AND CLEMENT SKINNER JJCA
24 SEPTEMBER 2012

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Contract — Breach — Sale of land — Sale and purchase agreement — Failure to comply with conditions precedent and failure to deliver vacant possession of land — Whether plaintiff had waived requirement that defendant should obtain approval of its shareholders for sale of shares to plaintiff — Whether plaintiff's failure to pay balance of purchase price entitled defendant to terminate SPA — Whether

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defendant's failure to deliver vacant possession of land made SPA voidable at plaintiff's option — Whether deposit should be refunded to plaintiff — Whether plaintiff entitled to damages

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The plaintiff and the defendant entered into an agreement ('the SPA') whereby the defendant agreed to sell and the plaintiff agreed to purchase 931,002 of the shares of Choo Hoe Sdn Bhd ('CHSB') at the purchase price of RM16m. Although the SPA was ostensibly for the sale and purchase of the entire share holding of CHSB to the plaintiff, the true nature of the transaction was in reality for the sale and purchase of a piece of land (the land), which CHSB

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owned. The SPA was subject to two conditions precedent, namely the approval of the FIC within 75 days from the date of the SPA and the approval of the defendant's shareholders in an EGM for the sale of the shares to the plaintiff. Upon execution of the SPA, the plaintiff had paid to the defendant a deposit of RM1.6m or 10% of the purchase price. It was a term of the SPA that the

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defendant should deliver vacant possession of the land to the plaintiff on the completion date and that time would be the essence of the SPA. However, when the plaintiff discovered various encroachments on the land and also the fact that a tenanted car park remained in operation on the land, it put the defendant on notice with regard to the encroachments on the land and

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requested the date for completion of the SPA to be extended until such time as the defendant was able to deliver vacant possession of the land. When the defendant allegedly failed or neglected to remove the encroachments or prepare the land for delivery of vacant possession on the completion date, the plaintiff commenced an action against the defendant for the return of the deposit

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monies amounting to RM1.6m that it had paid to the defendant, damages, interests and costs. The plaintiff averred that in addition to its failure to remove the encroachments on the land, the defendant had also failed to fulfill the conditions precedent in the SPA. According to the defendant all the encroachments on the land had been removed except for the car park operation

that would cease by the completion date. Alternatively the defendant submitted that the obligation to deliver vacant possession of the land constituted a mere warranty and that the breach of that warranty did not entitle the plaintiff to delay the payment of the balance of the purchase price to the defendant. The defendant thus argued that since the plaintiff had failed to pay the balance of the purchase price it was entitled to terminate the contract pursuant to the SPA and that the plaintiff would forfeit the deposit it had paid. The High Court judge dismissed the plaintiff's claim with costs and hence the present appeal. In this appeal the plaintiff maintained that the defendant was in breach of the SPA by its failure to comply with the conditions precedent in the SPA and in failing to deliver vacant possession of the land. The defendant contended that the conditions precedent were inapplicable and superceded by the plaintiff's letter, which purported to waive the requirement that the defendant should obtain the approval of the defendant's shareholders in an EGM approving the sale of the shares to the plaintiff.

Held, allowing the appeal with costs of RM50,000:

(1) The plaintiff's letter purportedly waiving the requirement for the approval of the defendant's shareholders in an EGM for the sale of the shares to the plaintiff was ineffective and void by virtue of s 132C of the Companies Act 1965 ('the CA'). As provided in s 132C of the CA, mandatory legislative requirements could not be waived by agreement of the parties. Thus the conditions precedent had to be complied with. Bereft of that compliance the SPA became voidable at the option of the plaintiff and the plaintiff was entitled to the refund of the deposit and to obtain damages in the ordinary way (see paras 32–33 & 36).

(2) The clauses in the SPA showed that the contractual obligations of the parties were reciprocal. On the completion date, the plaintiff was to pay the balance of the purchase price while the defendant was to deliver vacant possession of the land. The reciprocal nature of the contractual obligations of the parties attracted the provisions of ss 52, 53 and 55 of the Contracts Act 1950 ('the Act'). Upon applying Illustration (a) to s 53 of the Act and the fact that the real nature of the transaction concerned a sale and purchase of the land, the obligation to deliver vacant possession had to be performed before the obligation to pay the balance of the purchase price. Further, by virtue of Illustration (a) to s 52 of the Act, the plaintiff would not be required to pay the balance of the purchase price on the completion date because on that date, the defendant was unable to deliver vacant possession of the land. By virtue of s 55 of the Act the plaintiff was also entitled to withhold payment of the balance of the purchase price until the encroachments had been cleared from the land (see paras 41–42, 46–48).

(3) The evidence revealed that there were various encroachments on the land

and that no notice had been served on the car park operator operating on the land. Events showed that the defendant had not delivered vacant possession on the completion date and that the balance of the purchase price was not paid on the completion date. The fact that the SPA stipulated that time was of the essence would activate s 56 of the Act, which provided that when time is of the essence and the contractual obligation is not performed on the stipulated time frame, the contract is voidable at the option of the promisee. Thus, the failure of the defendant to deliver vacant possession of the land to the plaintiff on the completion date, made the SPA voidable at the plaintiff's option (see paras 50, 54–55).

(4) The defendant's inability to deliver vacant possession of the land was a fundamental breach, which went to the root of the contract. This coupled with the voidability of the SPA at the instance of the plaintiff should be construed against the defendant. Consequently, it was unconscionable to allow the defendant to retain the deposit. It was just and reasonable for the deposit to be refunded to the plaintiff (see para 66).

(5) The defendant was also ordered to pay the plaintiff damages to be assessed by the Registrar of the High Court together with interest or in lieu of assessment, the sum of RM3.2m as agreed liquidated damages (see para 68).

[Bahasa Malaysia summary

Plaintif dan defendan telah memeterai satu perjanjian ('PJB') di mana defendan bersetuju untuk menjual dan plaintif bersetuju untuk membeli 931,002 saham-saham Choo Hoe Sdn Bhd ('CHSB') pada harga belian RM16 juta. Walaupun PJB itu kononnya untuk jualan dan belian keseluruhan pegangan saham CHSB kepada plaintif, sifat sebenar urus niaga tersebut ialah untuk jualan dan belian sebidang tanah ('tanah') yang dimiliki CHSB. PJB tersebut tertakluk kepada dua syarat-syarat terdahulu, iaitu kelulusan FIC dalam jangka masa 75 hari daripada tarikh PJB dan kelulusan pemegang-pemegang saham defendan di dalam mesyuarat agung luar biasa ('MAL') untuk belian saham-saham kepada plaintif. Selepas PJB dimeterai, plaintif telah membayar kepada defendan deposit RM1.6 juta atau 10% daripada harga belian. Salah satu syarat di dalam PJB ialah defendan seharusnya menyerahkan milikan kosong tanah tersebut kepada plaintif pada tarikh siap dan bahawa masa merupakan inti pati PJB. Walau bagaimanapun, apabila plaintif mendapati pelbagai pencerobohan berlaku ke atas tanah tersebut dan juga fakta bahawa tempat letak kereta yang disewa masih lagi beroperasi di atas tanah tersebut, plaintif memberikan notis kepada defendan mengenai pencerobohan-pencerobohan ke atas tanah dan meminta tarikh siap PJB dilanjutkan sehingga masa di mana defendan boleh menyerahkan milikan kosong tanah tersebut. Apabila defendan dikatakan gagal atau mengabaikan untuk menghapuskan pencerobohan-pencerobohan atau menyediakan tanah

tersebut untuk penyerahan milikan kosong pada tarikh siap, plaintif memulakan tindakan terhadap defendan untuk memulangkan duit deposit berjumlah RM1.6 juta yang dibayar kepada defendan, ganti rugi, faedah-faedah dan kos-kos. Plaintif berhujah bahawa sebagai tambahan kepada kegagalan defendan untuk menghapuskan pencerobohan-pencerobohan ke atas tanah tersebut, defendan juga gagal untuk memenuhi syarat-syarat terdahulu dalam PJB. Menurut defendan, kesemua pencerobohan ke atas tanah telah dihapuskan kecuali operasi tempat letak kereta yang akan dihentikan pada tarikh siap. Secara alternatif, defendan berhujah bahawa kewajipan untuk menyerahkan milikan kosong tanah merupakan satu jaminan semata-mata dan bahawa pelanggaran jaminan tersebut tidak memberikan hak kepada plaintif untuk menangguhkan bayaran baki harga belian kepada defendan. Defendan dengan ini menghujah bahawa memandangkan plaintif gagal untuk membayar baki harga belian maka defendan berhak untuk menamatkan kontrak menurut PJB dan bahawa plaintif akan kehilangan deposit yang dibayar olehnya. Hakim Mahkamah Tinggi mengetepikan tuntutan plaintif dengan kos dan oleh itu rayuan ini dibuat. Dalam rayuan ini, plaintif mengekalkan bahawa defendan telah melanggar PJB dengan kegagalannya untuk mematuhi syarat-syarat terdahulu dalam PJB dan kegagalan untuk menyerahkan milikan kosong tanah tersebut. Defendan menghujah bahawa syarat-syarat terdahulu tidak terpakai dan digantikan dengan surat plaintif yang bertujuan untuk mengetepikan keperluan bahawa defendan seharusnya mendapatkan kelulusan pemegang-pemegang saham defendan dalam MAL yang membenarkan jualan saham-saham kepada plaintif.

Diputuskan, membenarkan rayuan dengan kos RM50,000:

(1) Surat plaintif yang bertujuan mengetepikan keperluan untuk kelulusan pemegang saham-pemegang saham defendan dalam MAL untuk jualan saham-saham kepada plaintif adalah tidak berkesan dan terbatal menurut s 132C Akta Syarikat 1965 ('AS'). Seperti yang diperuntukkan di dalam s 132C AS, keperluan perundangan mandatori tidak boleh diketepikan melalui perjanjian pihak-pihak. Oleh itu, syarat-syarat terdahulu perlu dipatuhi. Kegagalan mematuhi PJB menjadikannya boleh dibatalkan atas pilihan plaintif dan plaintif berhak untuk pemulangan semula deposit dan mendapatkan ganti rugi mengikut cara biasa (lihat perenggan 32–33, 36).

(2) Klausa-klausa dalam PJB menunjukkan bahawa kewajipan kontrak antara pihak-pihak bersifat dua hala. Pada tarikh penyempurnaan, plaintif perlu membayar baki harga belian manakala defendan perlu menyerahkan milikan kosong tanah. Sifat dua hala kewajipan kontrak pihak-pihak menarik peruntukan-peruntukan ss 52, 53 dan 55 Akta Kontrak 1950 ('Akta'). Selepas mengguna pakai Ilustrasi (a) kepada s 53 Akta dan fakta bahawa sifat sebenar transaksi adalah mengenai jualan dan

belian tanah, kewajipan untuk menyerahkan milikan kosong perlu dilakukan sebelum kewajipan membayar baki harga belian. Seterusnya, menurut Ilustrasi (a) kepada s 52 Akta, plaintif tidak perlu membayar baki harga belian pada tarikh penyempurnaan kerana pada tarikh tersebut, defendan tidak dapat menyerahkan milikan kosong tanah. Menurut s 55 Akta, plaintif juga berhak untuk menahan bayaran baki harga belian sehingga pencerobohan-pencerobohan dihapuskan daripada tanah tersebut (lihat perenggan 41–42, 46–48).

(3) Keterangan menunjukkan bahawa terdapat pelbagai pencerobohan ke atas tanah dan bahawa tiada notis diberikan kepada pengendali tempat letak kereta yang beroperasi di atas tanah tersebut. Peristiwa-peristiwa menunjukkan bahawa defendan tidak menyerahkan milikan kosong pada tarikh penyempurnaan dan bahawa baki harga belian tidak dibayar pada tarikh penyempurnaan. Fakta bahawa PJB memperuntukkan masa merupakan intipati akan mengaktifkan s 56 Akta, yang menyatakan bahawa apabila masa merupakan satu inti pati dan kewajipan kontrak tidak dijalankan dalam jangka masa yang diperuntukkan, kontrak tersebut boleh dibatalkan atas pilihan penerima janji. Oleh itu, kegagalan defendan untuk menyerahkan milikan kosong tanah kepada plaintif pada tarikh penyempurnaan, menjadikan PJB boleh dibatalkan atas pilihan plaintif (lihat perenggan 50, 54–55).

(4) Kegagalan defendan untuk menyerahkan milikan kosong tanah merupakan pelanggaran utama, yang merupakan akar umbi kontrak. Ini ditambah pula dengan PJB yang boleh dibatalkan atas pilihan plaintif ditafsirkan terhadap defendan. Sehubungan dengan ini, adalah tidak sepatutnya defendan dibenarkan untuk menyimpan deposit tersebut. Adalah adil dan munasabah untuk deposit tersebut dipulangkan semula kepada plaintif (lihat perenggan 66).

(5) Defendan juga diarahkan untuk membayar ganti rugi kepada plaintif untuk dinilai oleh Pendaftar Mahkamah Tinggi bersama dengan faedah atau sebagai ganti taksiran, sejumlah RM3.2 juta sebagai ganti rugi jumlah tertentu yang dipersetujui (lihat perenggan 68).]

Notes

For a case on sale of land, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3174.

Cases referred to

Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, interveners) and another action [1996] 3 MLJ 385, HC (refd)

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] 1 MLJ 47, PC (refd)

Bowtell v Goldsbrough, Mort & Co Ltd (1906) 3 CLR 444 (refd)

Caltex Oil (Malaya) Ltd v Ho Lai Yoke & Anor [1964] 1 MLJ 76 (refd)
Central Malaysia Development Co Ltd v Chin Pak Chin [1967] 2 MLJ 174 (refd)
Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783, FC (refd)
Chee Ah Yew v Tuan Man, Tuan Lebeh, Haji Lateh bin Haji Salleh [1923] 5 FMS LR 36, SC (refd)
Choa Choon Neoh v Spottiswoode (1869) 1 Kyshe's Report 216 (refd)
Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah [2007] 2 MLJ 746, CA (refd)
Cumberland Consolidated Holdings Ltd v Ireland [1946] 1 All ER 284, CA (refd)
In the Goods of Abdullah (1835) 2 Ky Ec 8 (refd)
K Umar Kandha Rajah v EL Magness [1985] 1 MLJ 116; [1984] 1 CLJ (Rep) 416, FC (refd)
Kang Yoon Mook Xavier v Insun Development Sdn Bhd [1995] 2 MLJ 91, HC (refd)
Kanwar Bhan-Sukha v Ganpat [1926] 94 IC 304 (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457; [1989] 4 PCC 757 (PC) (refd)
Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805, SC (refd)
Lim Kim Swee v Tan Meng San [1960] 1 MLJ 262, CA (refd)
Muralidhar Chatterjee v International Film Co Ltd AIR 1943 PC 34, HC (refd)
National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)
Omar bin Mat Ziki v Mokhtar bin Amin [1996] 2 MLJ 687, HC (refd)
Perri v Coolangatta Investments Pty Ltd (1982) 41 ALR 441, HC (refd)
Property & Bloodstock Ltd v Emerton, Bush And Another v Property & Bloodstock Ltd And Others [1968] Ch 94, CA (refd)
Shigenori Ono v Thong Foo Ching & Ors [1992] 1 MLJ 117, HC (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257, FC (refd)
Tan Meng San v Lim Kim Swee [1962] 1 MLJ 174, CA (refd)
Tan Tien Choy v Kiaw Aik Hang Co Ltd [1966] 1 MLJ 102, FC (refd)
Tsang Yee Kwan v Majlis Perbandaran Batu Pahat [2011] 8 CLJ 913, CA (refd)
Van Buskirk v Kuhns (1913) 164 Cal 472 (refd)
Yeap Cheah Neo v Ong Cheng Neo (1875) LR 6 PC 381, PC (refd)

Legislation referred to

Civil Law Act 1956 s 3
Companies Act 1965 s 132C
Contracts Act 1950 ss 52 Illustration (a), 53 Illustration (a), 54, 55, 56

Appeal from: Civil Suit No D9(D1)(D6)–22–135 of 2002 (High Court, Kuala Lumpur)

Jeremy Lee (AI Nathan with him) (AI Nathan) for the plaintiff appellant.
SK Sivam (PG Lim & Co) for the defendant respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] We will refer the parties like what they were referred to at the High Court. Thus, Code Focus Sdn Bhd will be referred to as the plaintiff while Tan Chee Hoe & Sons Sdn Bhd will be referred to as the defendant.

[2] The plaintiff is a company incorporated in Malaysia under the Companies Act 1965 with a business address at Suite 8–3B, Bangunan Lim, No 803–817, Batu 4 1/4, Jalan Ipoh, 51200 Kuala Lumpur.

[3] The defendant, on the other hand, is a company incorporated in Malaysia under the Companies Act 1965 with an address at No 1 & 1A, Jalan Ipoh Kecil, 50350 Kuala Lumpur.

[4] After a full trial, the learned High Court judge dismissed the plaintiff's claims with costs. Aggrieved, the plaintiff filed an appeal to this court.

THE SALIENT FACTS

[5] By an agreement dated 10 November 1995 ('the SPA'), the defendant agreed to sell and the plaintiff agreed to purchase 931,002 ordinary shares of RM1 each representing 100% of the issued and paid-up capital of Choo Hoe Sdn Bhd at the sale consideration of RM16m ('the purchase price'). The plaintiff agreed to purchase the equity of Choo Hoe Sdn Bhd for the simple reason that the plaintiff was interested in a piece of freehold land owned by Choo Hoe Sdn Bhd. The freehold land measured one acre, zero rood and 24.5 pole held under CT No 12920, Lot 92, Section 46, Bandar and Wilayah Persekutuan ('the land').

[6] Inter alia, the following terms and conditions were stipulated in the SPA:

(a) that upon execution of the SPA, a total sum of RM1,600,000 shall be paid by the plaintiff to the defendant as 'deposit' representing 10% of the purchase price (see cl 2.2(a)–(b) of the SPA);

(b) that the balance of the purchase price amounting to RM14,400,000 was to be paid by the plaintiff to the defendant on or before 9 February 1996 ('the completion date') (see cl 2.2(c) of the SPA);

(c) that the completion of the SPA was subject to two conditions precedent, namely:

(i) approval of the foreign investment committee ('the FIC approval') within 75 days from the date of the SPA; and

(ii) approval of the defendant's shareholders in an extraordinary general meeting ('EGM') approving the sale of the shares to the plaintiff (see cl 3.5 of the SPA);

(d) that the defendant shall deliver vacant possession of the land to the plaintiff on the completion date (see Recital I and cl 8.1(21)(d) of the SPA);

(e) that the defendant shall refund the deposit free of interest to the plaintiff in the event the FIC approval is not obtained (see cl 3.4 of the SPA);

(f) that the defendant warrants, represents and undertakes with the plaintiff that:

(i) neither the defendant nor Choo Hoe Sdn Bhd have created any mortgages, charges, liens, encumbrances or granted any equities or options or otherwise dispose off the land or any part thereof (see cl 8.1(21)(b) of the SPA); and

(ii) there are no squatters occupying any part of the land and that the defendant shall at its own costs and expenses evict all the squatters thereto and pay all compensation thereof and/or terminate the existing month-to-month tenancy and forthwith deliver vacant possession of the land to the plaintiff on the completion date (see cl 8.1(21)(d) of the SPA);

(g) that in the event the plaintiff fails, refuses or neglects to pay the balance of the purchase price on or before the completion date, the SPA shall automatically terminate and the defendant is entitled, inter alia, to absolutely forfeit the deposit; and

(h) that time, wherever mentioned, shall be the essence of the SPA (see cl 12.11 of the SPA).

[7] Sometime in January 1996, the plaintiff came to know that there were several encroachments on the land and the plaintiff itemised the particulars of those encroachments in this manner:

(a) that the rear portion of the three timber buildings erected on the neighbour's land at the western boundary encroached into the land between the region of two–ten feet;

(b) that various fixtures enabling activities like cooking, clothes washing and

drying and the rearing of chickens and ducks in relation to the extended timber structure on the western boundary of the neighbour's land encroached into the land;

(c) that the corner of a squatter building, which was used as a grocery store, encroached into the land by approximately five feet; and

(d) that the tenanted car park remained in operation on the land.

[8] By way of a letter dated 5 February 1996, the plaintiff's solicitors wrote to the defendant's solicitors and put the defendant on notice in regard to the encroachments on the land and requested that the date for completion of the SPA be extended until such time as the defendant is able to deliver vacant possession of the land.

[9] In breach of the SPA, the plaintiff averred that the defendant failed, neglected and/or refused to remove the encroachments or prepare the land for delivery of vacant possession on or before the completion date to the plaintiff.

[10] And in breach of the SPA, the encroachments remained on the land as at the completion date and the defendant failed to deliver vacant possession of the land to the plaintiff.

[11] Again, in breach of the SPA, the defendant failed, refused and/or neglected to fulfill the conditions precedent in the SPA as at the completion date when:

(a) the defendant failed to apply and/or obtain the FIC approval in accordance with cll 3.1–3.3 of the SPA; and

(b) when the defendant failed to obtain the approval of its shareholders in an EGM approving the sale of the shares to the plaintiff pursuant to cl 3.5 of the SPA.

[12] It was the stand of the plaintiff that the defendant had wrongfully terminated the SPA and without lawful authority and in breach of the SPA, forfeited the deposit on the ground that the plaintiff has failed to pay the balance of the purchase price on the completion date.

[13] It was said that the plaintiff was at all material times ready, willing and able to honour its obligations under the SPA subject to the SPA becoming unconditional and that the defendant was able to deliver vacant possession of the land to the plaintiff.

[14] For these varied reasons, the plaintiff sought from the defendant the following prayers:

(a) the return of the deposit sum of RM1,600,000 paid by the plaintiff to the defendant;

(b) damages;

(c) interest at the rate of 8%pa from 10 February 1996 till the date of full settlement;

(d) costs; and

(e) such further or other relief as the court deems fit and proper.

[15] It was the stand of the defendant that all the encroachments outlined in the surveryor's report had been removed on 8 February 1996 except the car park operation that would cease by the completion date.

[16] In regard to the intrusion of the wooden structure comprising the grocery store of approximately two feet, it was the stand of the defendant that this two feet intrusion would be removed on or about 11 February 1996.

[17] The stand of the defendant was that it was ready and willing to deliver vacant possession of the land to the plaintiff on the completion date.

[18] According to the defendant, the obligation to deliver vacant possession of the land to the plaintiff constituted a mere warranty and the breach of that warranty entitled the plaintiff to claim for damages and not to delay or hold back payment of the balance of the purchase price to the defendant. And since time was of the essence, and if the plaintiff failed to pay the balance of the price by 5pm on the completion date, the defendant was entitled to terminate the contract pursuant to cl 11A of the SPA.

ANALYSIS

[19] The 'real nature' of signing the SPA must be ascertained in order to determine 'the true rights and interests of the parties'. This was the view of Wylie CJ (Borneo) in *Tan Tien Choy v Kiaw Aik Hang Co Ltd* [1966] 1 MLJ 102 (FC), at p 104:

> The court must take into account the real nature of this agreement to determine the true rights and interests of the parties.

[20] Abdul Malek Ahmad FCJ (later PCA) writing for the Federal Court in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima*

Realty Sdn Bhd & Ors [2003] 3 MLJ 257, quoted the following passage from the Court of Appeal at p 269E as follows:

> Parties to a transaction may disguise its true nature and purport by whatever means available to them. Yet, the court will tear away the disguise and reveal to the world at large the true arrangement arrived at between the parties. It is important for reasons of public policy that the court is seised of this power. Were it not so, the law would be lending its aid to enforce pretended and not real obligations.

[21] In the same vein, Gopal Sri Ram JCA (later FCJ) writing a separate judgment in *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746 (CA), at p 755, had this to say:

> (18) It is a guideline to contractual interpretation that a court is not confined to look only at the formal contract. It is entitled to take into account the circumstances surrounding the making of the contract, including the factual matrix that forms the background to the contract (see *Keng Huat Film Co Sdn Bhd v Makhanlal (Properties) Pte Ltd* [1984] 1 MLJ 243). Essentially the approach is objective. The court is not concerned with the subjective intention of the parties. It is their imputed intention that is relevant. Lord Clyde in *Bank of Credit and Commerce International SA v Munawar Ali* put the approach in this way:
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> > The knowledge reasonably available to them (the parties to contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement.

[22] The factual matrix narrated in the early part of this judgment showed that although the SPA was ostensibly for the sale and purchase of the entire share holding of Choo Hoe Sdn Bhd, the true nature of the transaction was in reality for the sale and purchase of the land.

[23] It must be recalled to mind that the defendant wholly owned Choo Hoe Sdn Bhd and the latter is the registered owner of the land. One person by the name of Mr Lim Beng ('PW1') was interested in purchasing the land for himself or his nominee. He initially via his company known as Lim Beng & Brothers Sdn Bhd offered by letter dated 5 July 1995 (marked as exh 'P1' as seen at pp 692–693 of the appeal record at *Jilid* 4, *Bahagian* 'C') to purchase from the defendant the entire shareholding in Choo Hoe Sdn Bhd for RM16m so that Lim Beng & Brothers Sdn Bhd will become the owner of the land.

[24] For this purpose, Mr Lim Beng (PW1) paid RM160,000 being 1% of the purchase price on 26 July 1995 (marked as exh 'P4' as seen at p 696 of the appeal record at *Jilid* 4, *Bahagian* 'C') and he also caused a caveat to be entered on the land.

[25] Now, for fear of repetition, the SPA was signed on 10 November 1995 and a further sum of RM1,440,000 was paid by the plaintiff. This sum together with the sum of RM160,000 totalled RM1,600,000 and this formed 10% of the purchase price and it represented the 'deposit'.

[26] On the date when the SPA was signed, the solicitors for Lim Beng & Brothers Sdn Bhd informed the defendant that the purchaser of the shares was to be substituted by a company known as Code Focus Sdn Bhd — the plaintiff herein. And this was also the finding of the High Court at p 18 of the appeal record at *Jilid* 1, *Bahagian* 'A' at para 11 which reads as follows:

> It appears from the evidence and documents tendered that it was at this meeting that the defendant came to know that Code Focus Sdn Bhd (the plaintiff) would now substitute for Lim Beng & Brothers as the purchaser. The SPA was amended accordingly.

[27] The two conditions precedent in the SPA must be highlighted. Firstly, it concerned the approval of the FIC within 75 days from the date of the SPA. Secondly, it concerned the approval of the defendant's shareholders in an EGM for the sale of the shares to the plaintiff.

[28] At common law, bearing in mind that it has been introduced in Malaysia by cases such as *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381; *In the Goods of Abdullah* (1835) 2 Ky Ec 8; *Choa Choon Neoh v Spottiswoode* (1869) 1 Kyshe's Report 216; and s 3 of the Civil Law Act 1956 (Revised 1972), the concept of a condition precedent agreement has been considered by the courts in England *(Chitty on Contracts,* Vol 1, (30th Ed), General Principles at p 228; and *Cheshire, Fifoot and Furmston's Law of Contract*, Singapore and Malaysian Edition, Andrew Phang Boon Leong at pp 248–253) and Malaysia. Two basic legal propositions in regard to a condition precedent agreement may be advanced:

(a) a condition precedent agreement for the sale and purchase of a piece of land is a valid agreement. If the conditions are satisfied, then there is a sale of the piece of land. However, if the conditions are not satisfied, then there is no valid sale of the land. This means that there is no valid contract when the conditions precedent remain unfulfilled. And there is no sale or transfer of the land by the parties. See *Property & Bloodstock Ltd v Emerton, Bush And Another v Property & Bloodstock Ltd And Others* [1968] Ch 94 (CA); *Perri v Coolangatta Investments Pty Ltd* (1982) 41

ALR 441; Visu Sinnadurai, *The Sale and Purchase of Real Property in Malaysia* at pp 50–62; and *Anson's Law of Contract* (28th Ed), at pp 116–118); and

(b) a condition precedent agreement for the sale and purchase of a piece of land is not a valid agreement if the conditions precedent cannot be fulfilled by the parties. Put in another way, there is no contract at all if the conditions precedent cannot be fulfilled by the parties (see *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] 1 MLJ 47 (PC) which was followed by *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 (FC)).

[29] In simple language, a condition precedent is a condition in the contract which must be performed before a liability arises. And a condition precedent must be averred and proved by the plaintiff (*Van Buskirk v Kuhns* (1913) 164 Cal 472).

[30] Now, on behalf of the defendant, it was argued that the conditions precedent were inapplicable and superceded by the plaintiff's letter dated 10 November 1995 and marked as exh 'P5' as seen at p 718 of the appeal record at *Jilid* 4, *Bahagian* 'C'. Inter alia, exh 'P5' stated that 'clauses 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6 of the sale and purchase agreement shall no longer apply'.

[31] For the plaintiff, it was argued that the plaintiff's letter in exh 'P5' was ineffective to waive compliance with cll 3.1–3.6 of the SPA because on the date of the signing of the SPA, which was on 10 November 1995, the plaintiff was not incorporated as yet and therefore the late Mr Lim Beng (PW1) or for that matter anyone else could not have bound the plaintiff to this letter.

[32] It was also argued, on behalf of the plaintiff, that the plaintiff's letter in exh 'P5' purported to waive the requirement that the defendant should obtain the approval of the defendant's shareholders in an EGM approving the sale of the shares to the plaintiff. And this, according to the plaintiff, was impermissible by virtue of s 132C of the Companies Act 1965 which enacts as follows:

> Approval of company required for disposal by directors of company's undertaking or properly
>
> (1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for —
>
> (a) the acquisition of an undertaking or property of a substantial value; or

(b) the disposal of a substantial portion of the company's undertaking or property,

unless the arrangement or transaction has been approved by the company in a general meeting.

(2) The Court may, on the application of any member of the company, restrain the directors from entering into a transaction in contravention of subsection (1).

(3) Where an arrangement or transaction is carried into effect in contravention of subsection (1), the arrangement or transaction shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.

(4) This section shall not apply to proposals for disposing of the whole or substantially the whole of the company's undertaking or property made by a receiver and manager of any part of the undertaking or property of the company appointed under a power contained in any instrument or by a Court or a liquidator of a company appointed in a voluntary winding up.

(5) Any director who contravenes the provision of this section shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or thirty thousand ringgit or both

(6) In this section, 'director' includes the chief executive officer, the chief operating officer, the chief financial controller or any other person primarily resposible for the operations or financial management of a company, by whatever name called.

[33] In our judgment, the plaintiff's letter in exh 'P5' referred to as the 'side letter' by learned counsel on both sides is void by virtue of s 132C of the Companies Act 1965 and the mandatory statutory requirement of this section cannot be waived by agreement of the parties (*Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 (SC)).

[34] Waiver of legislative requirements by way of exh 'P5' will not be entertained by this court. In the same vein, the Federal Court in *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783, at pp 790–791 of the report had this to say:

(17) Counsel for the appellant submitted that the Court of Appeal had erred in the above conclusion. It is his submission that parties to an agreement cannot waive statutory requirements. The MOF's approval is required under the Securities Industries Act 1983 (then in force) and the 1987 Regulations whilst the FIC's condition is only a policy of the government and not backed by any written law. I find that this is the correct statement of the law.

(18) The law on this is quite established. Once it is enacted by legislation that parties are required to comply with any provision, parties must comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done. Legislation enacts laws which in its opinion are for the benefit of the public. It is not for the courts, or anybody for that matter, to say that it need not be followed. This was clearly expressed in *Surajmull Nargoremull v Triton Insurance Company Limited* [1924] LR 52 IA 126 at p 128 where Lord Sumner held as follows:

> No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset: *Nixon v Albion Marine Insurance Co* [1867] LR 2 Ex 338. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible. The expression of an agreement for sea-insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or a prescription of the proper way of making such an agreement To allow the suit to proceed in defiance of s 7 would defeat the provisions of the law laid down therein.

(19) The leading Malaysian authority regarding the fulfillment of conditions in a contract is the decision of Lord Jenkins in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] 1 MLJ 47 where it was held by the Privy Council that parties must fulfill the conditions stipulated in the agreement. It was thus made plain beyond argument that the fulfillment of a condition precedent in a contract of sale is binding upon the parties. See also *Waman Shriniwas Kini v Ratilal Bhagwandas and Co* AIR 1959 SC 689 and *Dhanukdhari Singh & Anor v Nathima Sahu & Ors* [1970] 11 Cal WN 848.

[35] The effect of the plaintiff's letter in exh 'P5' is this. That it is ineffective and void.

[36] And that cll 3.1–3.6 of the SPA are operative and the conditions precedent must be complied with. Bereft of that compliance, the SPA becomes voidable at the option of the plaintiff and the plaintiff is entitled to the refund of the 'deposit' and to obtain damages in the ordinary way.

[37] Now, preamble (1) to the SPA reads as follows:

> Upon the execution of this Agreement, the vendor and/or the company shall serve notice on the tenant operating a car park on the said property and as at the date of the completion of this Agreement, the vendor shall deliver vacant possession of the said property to the purchaser.

[38] The 'vendor' refers to the defendant while the 'purchaser' refers to the plaintiff. It is always ideal to refer to the preamble of a contract. It assists in ascertaining the meaning to the contract. It is akin to referring to the long title of an Act which would assist in ascertaining the meaning behind the law as stated by Griffith CJ in *Bowtell v Goldsbrough, Mort & Co Ltd* (1906) 3 CLR 444 at p 451.

[39] The purchase price of the land, the 'deposit' and the balance of the purchase price have been alluded to earlier. By virtue of cl 2.2(c) of the SPA, the balance of the purchase price was to be paid within three months and that would be by 9 February 1996. The completion date too has been decided. While cl 8.1(21)(d) of the SPA stipulates that:

> There are no squatters occupying any part of the said property and the vendor (referring to the defendant) shall at its own costs and expense evict all such squatters and pay all compensation thereof and/or terminate the existing month-to-month tenancy and forthwith deliver vacant possession of the said property to the company (referring to the plaintiff) on the completion date.

[40] We will proceed further and make reference to the other clauses in the SPA. Clause 11A of the SPA states that if the plaintiff does not pay the balance of the purchase price by 9 February 1996, the SPA shall automatically terminate and the defendant shall absolutely forfeit the 'deposit'. And cl 12.11 of the SPA categorically states that 'time wherever mentioned shall be of the essence'.

[41] Now, the clauses in the SPA showed that the contractual obligations of the parties are reciprocal. On the completion date, the plaintiff was to pay the balance of the purchase price while the defendant was to deliver vacant possession of the land. It is said that their obligations are simultaneous.

[42] In our judgment, the reciprocal nature of the parties contractual obligations attract the provisions of ss 52– 53 and 55 of the Contracts Act 1950. Section 52 of the Contracts Act 1950 stipulates that when a contract consists of reciprocal promises which are to be simultaneously performed, the promisor need not perform his promise unless the promisee is ready and willing to perform his promise. For s 52 of the Contracts Act 1950 to apply, the parties must have made promises that are to be performed simultaneously. See *Chee Ah Yew v Tuan Man, Tuan Lebeh, Haji Lateh bin Haji Salleh* [1923] 5 FMS LR 36 (SC); *Central Malaysia Development Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174; *Kanwar Bhan-Sukha v Ganpat* [1926] 94 IC 304; *Caltex Oil (Malaya) Ltd v Ho Lai Yoke & Anor* [1964] 1 MLJ 76; *Abdul Rahim bin Syed Mohd v*

Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, interveners) and another action [1996] 3 MLJ 385; and *Shigenori Ono v Thong Foo Ching & Ors* [1992] 1 MLJ 117.

[43] Section 53 of the Contracts Act 1950 states that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires (*Omar bin Mat Ziki v Mokhtar bin Amin* [1996] 2 MLJ 687; *Lim Kim Swee v Tan Meng San* [1960] 1 MLJ 262 (CA); and *Tan Meng San v Lim Kim Swee* [1962] 1 MLJ 174 (CA)).

[44] In a situation where one party prevents the other from performing his promise, under s 54 of the Contracts Act 1950, the said contract becomes voidable at the option of the party that is prevented from performing the contract. In such a situation, the party may rescind the contract under s 54 of the Contracts Act 1950 (*Muralidhar Chatterjee v International Film Co Ltd* AIR 1943 PC 34).

[45] The Privy Council in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 4 PCC 757 (PC), held that s 55 of the Contracts Act 1950 imported the common law principles of dependent and independent covenants into our country.

[46] Applying Illustration (a) to s 53 of the Contracts Act 1950 and the fact that the 'real nature' of the transaction concerned a sale and purchase of the land, the obligation to deliver vacant possession must first be performed before the obligation to pay the balance of the purchase price can be insisted upon.

[47] And by virtue of Illustration (a) to s 52 of the Contracts Act 1950, the plaintiff need not pay the balance of the purchase price on the completion date because on that date, the defendant could not deliver vacant possession of the land.

[48] Furthermore, by virtue of s 55 of the Contracts Act 1950, the plaintiff was entitled to withhold the payment of the balance of the purchase price until the encroachments had been cleared from the land (*Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* at pp 756–757, the judgment of Zulkefli Makinuddin JCA (now Chief Judge Malaya)).

[49] It is germane, at this juncture, to refer to the speech of Gill J (as he then was) in the case of *Central Malaysia Development Co Ltd v Chin Pak Chin* at p 176 of the report:

To my mind, it is clear from a reading of the agreement as a whole that the reciprocal promises by the parties were to be performed simultaneously. In the circumstances the contention on behalf of the plaintiff that section 52 of the Contracts (Malay States) Ordinance, 1950 applies must prevail. Section 52 reads as follows:

> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

In the present case the plaintiffs had the money so as to be able to perform his part of the bargain. They had deposited their money with their solicitors and their solicitors had notified the defendant's solicitors accordingly and asked if the defendant was in a position to perform his part of the bargain. As I have stated above, the defendant was in no position to give vacant possession on 31st July, 1965, which on a reading of the agreement as a whole was clearly the date for the completion of the sale, nor was he in a position to execute a valid transfer which could be registered under the provisions of section 110 of the Land Code (F.M.S. Cap. 138). The fact that it was possible to register a transfer under the provisions of section 232 of the Land Code was beside the point. The defendant had in fact twice asked for extension of time to complete the sale. He was therefore clearly in breach of the contract and the plaintiffs had the right to repudiate. As stated in Halsbury (3rd Edition) Volume 34, page 324, paragraph 550, the purchaser has the right to repudiate the contract immediately upon the failure of the vendor to perform something which goes to the root of the contract. The inability of the defendant to give vacant possession by itself was something which went to the root of the contract in the present case. The plaintiffs therefore were perfectly entitled to repudiate the contract and they are clearly entitled to have their money back.

[50] Proceeding ahead, it cannot be denied that there were various encroachments on the land. There was also a car park operating on the land. The evidence also revealed that no notice was served to the car park operator as required under preamble (1) to the SPA. However, there was evidence that the car park operator was verbally notified to leave the land by the completion date.

[51] By letter dated 5 February 1996, the plaintiff's then solicitors wrote to the defendant's solicitors and informed them that there were various encroachments on the land and that the defendant was not in a position to give vacant possession on the completion date. The defendant was invited to extend time for completion to a date when the defendant was in a position to deliver vacant possession.

[52] By letter dated 9 February 1996, the defendant's solicitors wrote to the plaintiff's then solicitors and stated that all the encroachments and intrusions have been removed by 8 February 1996 with the exception of an intrusion of about two feet and this intrusion would be removed on 11 February 1996. In regard to the car park operations, it was stated that it would cease by the completion date. This letter also stated that the requirement that the defendant

shall deliver vacant possession was only a warranty and not a condition of the SPA and therefore, if breached, the plaintiff was only entitled to damages. This letter also stated that the balance of the purchase price must be paid on the completion date, because time was of the essence.

[53] Events showed that the defendant did not deliver vacant possession on the completion date and the balance of the purchase price was also not paid on the completion date.

[54] Clause 12.11 of the SPA stipulates that time is of the essence. That being the case, we will activate s 56 of the Contracts Act 1950. This section states that when time is of the essence and the contractual obligation is not performed on the stipulated time frame, the contract is voidable at the option of the promisee.

[55] As alluded to earlier, the defendant's contractual obligation under the SPA was to deliver vacant possession on the completion date because time was of the essence and an essential condition of the SPA. And the failure of the defendant to deliver vacant possession of the land to the plaintiff on the completion date, made the SPA voidable at the plaintiff's option. In similar vein, Abdul Malik bin Ishak J (now JCA) in *Kang Yoon Mook Xavier v Insun Development Sdn Bhd* [1995] 2 MLJ 91, aptly said at pp 95–96 of the report:

> Since time is the essence of the S & P agreement, it is appropriate, at this juncture, to refer to s 56(1) of the Contracts Act 1950 which enacts, inter alia, that where time is the essence of the contract, failure to perform within the stipulated time will entitle the injured party to avoid the contract. But the injured party has the right to elect not to avoid the contract but to insist on performance and sue for damages. Lord Hailsham pointed out in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 that s 56(1) of the Contracts Act 1950 should be read closely with s 65 of the Contracts Act 1950 which provides for the consequences of rescission of a voidable contract. Lord Diplock in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212, in considering the effect of the failure to perform within a specified date, said succinctly (at p 218):
>
> > … Time being of the essence of the provisions in the sale agreement for payment of the purchase price, the failure of the caveator to pay on the due date was a breach of condition which the caveatees were entitled to elect to treat as bringing the contract to an end …
>
> *Halbury's Laws of England* (4th Ed) para 538 at p 370 sets out the general rule that:
>
> > Where one party to a contract has committed a serious breach by a defective performance or by repudiating his obligations under the contract, the innocent party will have the right to rescind the contract; that is to treat himself as discharged from the obligation to tender further performance, and sue for damages for any loss he may have suffered as a result of the breach. The breach

> itself does not terminate the contract, the innocent party having the right to elect to treat the contract as continuing or to terminate it by rescission.

Mustill LJ in *Lombard North Central Plc v Butterworth* [1987] QB 527 at p 535; [1957] 1 All ER 267 at pp 271–272; [1987] 2 WLR at p 13, in the same vein said this:

> A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach … It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of the essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach.

Applying the above principles to the present case, as time was provided to be of the essence of the S & P agreement, the stipulated time period within which the said house had to be delivered to the plaintiff became an essential condition of the S & P agreement. The failure of the defendant to fulfil this condition would entitle the plaintiff to have an option of treating the S & P agreement either: (a) as having been repudiated and sue for damages; or (b) as still continuing. The plaintiff rightly exercised his option to proceed under (a).

In my judgment, the plaintiff is entitled to terminate the S & P agreement and obtain the 10% of the purchase price; this course of action would place the plaintiff in a position like as though he did not enter into the S & P agreement at all. By virtue of s 56 of the Contracts Act 1950, the S & P agreement is said to be voidable at the option of the plaintiff (promisee), if the intention of the parties was to make time the essence of the S & P agreement, but if it were otherwise, the plaintiff (promisee) is entitled to compensation from the defendant (promisor) for any loss occasioned to the plaintiff by the defendant's failure to deliver the said house on or before 18 August 1988. In my judgment, time was the essence of the contract here, and as such, the contract between the parties was voidable. Since on the due date, that was on 18 August 1988, there was a failure on the defendant's part to deliver the said house, the plaintiff in law had the option of either to continue with the contract or to rescind it (see *Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308 and *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289).

[56] Now, based on the evidence led by both parties before the High Court, there were uncertainties as to whether the land was cleared of all encroachments and intrusions on the completion date. Furthermore, the extent of the encroachments or intrusions cannot be ascertained. And whether the car park operations have ceased on 9 February 1996 cannot be ascertained.

[57] But what was certain was this. That on 9 February 1996, there was at the very least an intrusion which the defendant represented that it will be cleared on 11 February 1996. And that the car park operator said that he would cease

operation when required to do so and that would be on 9 February 1996. In short, to put it mildly, the car park operator was still operating the car park on the land on 9 February 1996.

[58] The defendant was magnanimous and conceded that by looking at the four photographs placed together at p 983 of the appeal record at *Jilid* 6 of *Bahagian* 'C', it showed profusions from the wooden structures and materials that were simply left or placed on the land. In the same breath, the defendant said that the same could be easily removed.

[59] The defendant also conceded at p 1004 of the appeal record at *Jilid* 6 of *Bahagian* 'C' that the car park operators' shed on the land together with the car park entrance and the open shed beyond the entrance could be pulled down or removed.

[60] At this juncture, it is instructive to refer to the decision of Lord Greene MR in *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 All ER 284 (CA), particularly at p 287, where His Lordship aptly said:

> If there had been no abandonment, and the property in the rubbish had remained in the vendor after completion, there would, in our opinion, have been a breach of the undertaking to give vacant possession. Subject to the rule de minimis, a vendor who leaves property of his own on the premises on completion cannot, in our opinion, be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, sc, as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment. Counsel for the appellant endeavoured to escape from this difficulty by relying on the abandonment which he said necessarily negatived any such claim by the appellant; once he abandoned the rubbish it could not be said that he was using the property as a place for deposit for his chattels, since ex hypothesi the rubbish was no longer his. But if we are right in our view that by abandoning the rubbish the appellant committed a breach of trust, can he be allowed to allege his own breach of trust as a defence to the present action? To allow him to do so would lead to serious injustice, and in our opinion, he is precluded from raising this point. In fact he is in a dilemma; for he must be claiming the right either to keep property of his own on the premises, or to use the premises as a place on which to deposit rubbish which he desires to abandon. In either case his action is inconsistent with the respondents' rights.
>
> But there is, we think, a quite different ground upon which the judgment under appeal can be supported. The phrase 'vacant possession' is no doubt generally used in order to make it clear that what is being sold is not an interest in a reversion. But it is not confined to this. Occupation by a person having no claim of right prevents the giving of 'vacant possession', and it is the duty of the vendor to eject such a person before completion: see *Royal Bristol Permanent Society v Bomash* (1887) 35 Ch D 390 40 Digest 187; 1562; 56 LJ Ch 840; 57 LT 179; and *Engell v Fitch* [1869] LR 4 QB 659, 40 Digest 263, 2284, 10 B&S 738, 38 LJQB 304. The reason for this, it appears to us, is that the right to actual unimpeded physical enjoyment is

> comprised in the right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment to which the purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser. It is true that in each case the purchaser obtains the right to possession in law, notwithstanding the presence of the impediment. But it appears to us that what he bargains for is not merely the right in law, but the power in fact to exercise the right. When we speak of a physical impediment we do not mean that any physical impediment will do. It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property. Such cases will be rare, and can only arise in exceptional circumstances, and there would normally be (what there is not here) waiver or acceptance of the position by the purchaser. The facts as found by the county court judge are of a very exceptional nature, since the presence of the rubbish which the purchaser never bought and to whose presence he never submitted did in fact make it impossible for him to use a substantial part of the property which he had bought.

[61] Likewise here, with two feet intrusions and wooden structures and materials still on the land on the completion date, the defendant could not be said to have been able to deliver vacant possession to the plaintiff. It was for this reason that the plaintiff invited the defendant to extend time for completion but the defendant refused.

[62] To compound the matter further, the car park operator was still operating on the land on the completion date. This meant that the plaintiff would not be able to enjoy the right to possession of the land without interference from the car park operators. The defendant had a duty to eject the car park operator before the completion date.

[63] The averments in the statement of claim alluded to encroachments on the land and the particulars gave the details of those encroachments. It is analogous to trespass. Abdul Malik bin Ishak JCA writing for the Court of Appeal in *Tsang Yee Kwan v Majlis Perbandaran Batu Pahat* [2011] 8 CLJ 913 had this to say about trespass at p 921 of the report:

> (22) In legal jargon, an intrusion by one person upon land in the possession of another is said to be trespass. According to Coleridge CJ in *Ellis v The Loftus Iron Company* (1874) LR 10 CP at p 12 that, '… if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.'
>
> (23) And any invasion of land, however minute and whether it causes damage or not, is a trespass. Thus, it is trespass to place anything on or in land in the possession of another.

[64] Continuing on the same page and spilling over to p 922 of the report, His Lordship had this to say:

> (26) It must be emphasised that in an action for trespass, it is not necessary that there should have been any actual damage (*Stoke-on-Trent City Council v W&J Wass Ltd* [1988] 1 WLR 1406, CA, at 1411, per Nourse LJ). A trespass is committed and it is so committed notwithstanding the trifling nature of the trespass. It is no defence to say in an action for trespass that the trespass is of a trifling nature (*Yelloly v Morley* (1910) 27 TLR 20).

[65] Mr Lim Beng (PW1) testified and at pp 127–128 of the appeal record at *Jilid* 2 of *Bahagian* 'B', the evidence revealed that the plaintiff was a cash buyer and was at all material times ready, willing and able to complete the purchase by paying the balance of the purchase price. It is crystal clear that the plaintiff did not need any financing and no loan was involved.

[66] The fundamental breach by the defendant which went to the root of the contract in not delivering vacant possession of the land on the completion date coupled with the voidability of the SPA at the instance of the plaintiff, must be construed against the defendant and, consequently, it was unconscionable to allow the defendant to retain the deposit. See the decision of Syed Agil Barakbah FCJ writing for the Federal Court in the case of *K Umar Kandha Rajah v EL Magness* [1985] 1 MLJ 116; [1984] 1 CLJ (Rep) 416, at p 420. In our judgment, it is just and reasonable for the deposit to be refunded to the plaintiff.

[67] For these varied reasons, we unanimously allowed the appeal of the plaintiff with costs of RM50,000 here and below. The deposit of RM1,600,000 together with interest at the rate of 8%pa calculated from 10 February 1996 to the date of full settlement to be paid by the defendant to the plaintiff.

[68] We made a further order that the defendant to pay the plaintiff damages to be assessed by the registrar of the High Court together with interest at the rate of 8%pa calculated from 10 February 1996 to the date of full settlement or in lieu of assessment, the sum of RM3.2m as agreed liquidated damages, which was stipulated in cl 11B of the SPA to be paid by the defendant to the plaintiff.

Appeal allowed with costs of RM50,000.

Reported by Kohila Nesan